IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

v.

EL PASO NATURAL GAS COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Utah

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MOTION TO AFFIRM

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No. 776

UTAH PUBLIC SERVICE COMMISSION, *Appellant*

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MOTION TO AFFIRM

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, Intervenors in the case below and Appellees herein, hereby move, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, that the final judgment and decree of the United States District Court for the District of Utah be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

On April 6, 1964, this Court, in *United States of America v. El Paso Natural Gas Company*, 376 U.S. 651, found that the acquisition of the assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company substantially lessened competition in the sale of natural gas in California in violation of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, and this Court ordered "divestiture without delay" (p. 662).

Upon remand, a divestiture plan was approved by the District Court, but upon appeal this Court on February 27, 1967, in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129, among other things, disapproved the District Court's order of divestiture and remanded the case again, stating:

> "Once more, and nearly three years after we first spoke, we reverse and remand, with directions that there be divestiture without delay . . . ." (p. 142)

Upon remand, hearings began on June 9, 1967. The taking of evidence and hearings on motions consumed 11,083 pages of transcript as of November 7, 1968.

In the present order appealed from, the District Court accomplished two things. One, it designated the assets to be divested from El Paso, and as to this no appeal has been taken. Two, it chose Colorado Interstate Corporation (formerly Colorado Interstate Gas Company and hereinafter referred to as "CIG") as the successful applicant for acquisition, and it is to this choice that an appeal has been taken.

Simply put, Appellant complains that the selection of CIG as the successful applicant for the acquisition of the divested Northwest Division of El Paso does not restore competition to California as directed by *El Paso* and

Cascade, supra, and also that such selection will eliminate competition in other markets in violation of Section 7 of the Clayton Act.

It is the position of these Appellees that affirmance of the District Court's selection of CIG as the successful purchaser of the divested assets of the Northwest Division finally will result, after the lapse of five years since "divestiture without delay" was ordered, in a strong new competitor to the California market.

ARGUMENT

THE SELECTION OF CIG AS THE PURCHASER OF NEW COMPANY WILL PROVIDE A STRONG NEW COMPETITIVE FORCE IN CALIFORNIA.

The largest market served by El Paso Natural Gas Company consists of its sales to our Companies. Southern California Gas Company and Southern Counties Gas Company of California are gas public utilities serving in excess of ten million people in Central and Southern California. Our certificated service areas in which we provide gas public utility service extend from just south of Fresno in Central California to the Mexican border, being bounded on the West by the Pacific Ocean and on the East by the Colorado River forming the Arizona border (Tr. 9481-82).

This Court in its decision in *El Paso, supra,* which ordered the divestiture now implemented by the District Court, accurately referred to the "vast California market" as one whose "incremental needs are booming". These Appellees, referred to in *El Paso* as "Southern Companies", continue to have a ravenous need for additional gas supplies. The market growth in our service areas continues to be the epitome of what the Court described.

This Court has made abundantly clear its intent that the company to be divested from El Paso should be in a strong position to provide potential competition to El Paso in serving the California market. The trial court's selection of CIG as the successful applicant will accomplish that precise purpose.

Our intent in this proceeding has not been to influence the selection of or to defend the selection of any particular applicant. Our interest and objective is to have a new pipeline company available to compete with El Paso and other potential sources of supply for the California market as rapidly as possible. We deliberately refrained from expressing to the trial court any preference as to which applicant should be selected. Our reasoning is best explained in the brief these Appellees filed with the trial court on April 12, 1968, in which we stated:

> "We will not comment on the qualities of the applicants in this brief. Our reasons, as stated in our Comments filed in this matter on September 18, 1967, are: 1) indication of our support or opposition could result in unfair favoritism or prejudice to one applicant or another; and 2) as the largest potential customer of New Company we should remain in a position to discuss and negotiate with the Court's ultimate choice of a purchaser for early gas service to our market without having made a prior commitment to any applicant. We feel the latter reason is of particular importance to insure that the Supreme Court's mandate that New Company be an early competitive factor in the California market be met. Therefore, our brief is confined to commenting on certain issues and will not include a discussion of the several applicants."

The selection has now been made. No good reason exists to set it aside.

It was quite apparent throughout this reopened proceeding consuming more than 11,000 pages of transcript that the trial judge was proceeding with exemplary judicial restraint and making every human effort to avoid the possibility of one more reversal by this Court and a further prolongation of the proceeding.

Bluntly stated, it is time for this proceeding to come to an end. There are no applicants that can possibly satisfy all parties. To reopen the proceedings and select a different applicant could result only in further appeals to this Court by disappointed parties.

Time in and of itself is becoming a vital factor in the determination as to whether, in fact, New Company will ever have the opportunity to serve the California market. Our Companies introduced evidence into this proceeding that our supply needs are such as to make a new pipeline to serve our Companies economically feasible as early as 1970 (Tr. 9488).

Our needs for a new supply area to serve California are very real. Since the selection of CIG as the successful applicant, these Appellees and other California interests have entered into serious negotiations with CIG for the express purpose of achieving a new California project (Tr. 11,062-63, 11,068). This effort will be rendered nugatory and we shall have to look elsewhere for gas supplies if Utah's present effort should prove to be successful. The prospect of New Company penetrating the California market in accordance with this Court's expression in *El Paso* and in *Cascade* may then in retrospect prove to have been an ephemeral wish.

This Court must bear in mind that pipeline company competition has never been as intense throughout the United States as it is today. Contrary to the facts as they existed when this Court issued its original decree in this proceeding,

there are several strong pipelines serving California today. The trial judge recognized this new fact of life when he so clearly stated at Tr. 11,029:

> "... if it were not for the fact that this Court is satisfied that Colorado Interstate Gas Company because of the reasons set forth in the Court's opinion, is so far superior to any other Applicant and its ability to furnish real competition against these entrenched suppliers of the California market, the Court would not have selected Colorado Interstate ...."

CONCLUSION

The thrust of this response is along the lines in which these Appellees believe they can be of maximum assistance to this Court. It is intolerable that the final resolution of this proceeding with its attendant impact upon both the California and Northwest markets be further delayed. In the best interest of California consumers, we respectfully urge that this Court affirm the judgment below.

Respectfully submitted,

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